International Bank of Singapore Ltd v Peter Heiner Franz Bader

HIGH COURT (SINGAPORE) – SUIT NO 287 OF 1987
CHAO HICK TIN JC
29 SEPTEMBER 1988

Civil Procedure – Conditional leave to defend given – Appeal against – Defendant sued as guarantor – Plea of non est factum – Whether bank in breach of guarantee in allowing borrower to draw in excess of overdraft limit – Whether all drawings in excess of that limit should be disallowed as guarantor's consent not obtained – Whether bank negligent in not having sold charged property earlier – Merits of case

Banking – Guarantee – Guarantor sued for payment of outstanding overdraft facilities granted – Conditional leave to defend given – Appeal against – Plea of non est factum – Whether bank in breach of guarantee in allowing borrower to draw in excess of overdraft limit – Whether all drawings in excess of that limit should be disallowed as guarantor's consent not obtained – Whether bank negligent in not having sold charged property earlier – Merits of case

The plaintiffs sued the defendant as guarantor under a guarantee executed by the defendant and three others, including G. The guarantee was given in consideration of the plaintiffs granting banking facilities to H Company ('the company') and was in addition to a charge on a piece of property belonging to G and his wife. On an application of the plaintiffs for summary judgment against the defendant on the amount outstanding from the company, the assistant registrar granted the defendant conditional leave to defend. The defendant appealed against the order on the following seven grounds; (a) non est factum, in that he did not know what he was signing when he signed the document; (b) the sum claimed by the plaintiff was excessive; (c) the plaintiffs were in breach of the agreement/guarantee when they allowed the company to draw in excess of the overdraft limit and improperly paying out on two cheques; (d) the plaintiffs had given time to the company to pay even though its account was not satisfactorily maintained; (e) the plaintiffs had granted the company overdraft facilities exceeding the agreed limit and all drawings after that limit had been reached should be disallowed since the defendant's consent was not obtained to exceed that limit; (f) negligence of the plaintiff in not having sold the charged property earlier; and (g) the plaintiffs were in conspiracy with the company and G in order to do him harm by, inter alia, allowing the charged property to be sold by private treaty to a company in which two doctors were shareholders.

Held, dismissing the appeal but revising the terms of conditional leave granted:

(1) The word 'guarantee' appeared in bold letters on the top of the first page of the document. Surely the defendant would have seen that and understood what that word meant. If he really did not understand the document he was about to sign and was concerned about it, he should have reserved his position and sought independent advice. Even if G had misled him, he could have a cause of action against G. But that was not to say that he was entitled to renege on his commitment with the plaintiffs who had, based on his guarantee, given credit to his company. On the facts of this case, the plea of non est factum was clearly not available to the defendant.

(2) The simple answer to contention (b) was in cl 14 of the guarantee which provided that '... certificate signed on behalf of the bank by an officer of the bank shall be conclusive and binding on the guarantor as to any amount due to the bank by the borrower as aforesaid'. In any event, cl 3 of the guarantee expressly allowed the plaintiffs at any time to enlarge or vary the credit given to the company, to 'vary, exchange, abstain from perfecting or release any other securities' held by the plaintiffs and 'grant any indulgence to and make any other arrangements as it may think fit with the borrower'.

(3) There was clearly no merit in the defendant's third contention as cl 3 of the guarantee expressly allowed the plaintiffs to 'enlarge or vary' the credit facilities granted to the company. Also, the honouring by the plaintiffs of the two cheques was not improper as the cheques were regularly issued by the company with the necessary authorized signatories.

(4) The short answer to the fourth contention could be found in cl 3 of the guarantee where the plaintiffs were given liberty to 'give or agree to give time for payment ...'.

(5) The fifth contention ignored the fact that the guarantee which the defendant gave was an unconditional one and under cl 3 the plaintiffs were given the liberty to 'enlarge or vary' the credit.

(6) The defendant had not tendered any credible evidence to show that the property could have been easily sold earlier or that an auction sale would fetch a better price. Also, under the provisions of cl 3, the plaintiffs were not obliged to dispose of the property straight away irrespective of the market condition.

(7) There was no evidence produced to show that the two doctors were personal friends of G or related to him or that the sale was below market value at that time.

(8) The issues raised by the defendant were shadowy and hardly of any substance. The assistant registrar's decision to grant conditional leave to defend was the right decision. However, having regard to the financial circumstances of the defendant which were placed before the court and which were not before the assistant registrar, the conditions imposed were revised.

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No 55 of 1988.]

Cases referred to

1 *Saunders* v *Anglia Building Society* [1971] AC 1004 (folld)
2 *Devaynes* v *Noble*; *Clayton's* case (1816) 1 Mer 529; 35 ER 767 (refd)

Lai Siu Chiu (Ms) for the plaintiffs.
B Mohan Singh for the defendant.

Cur Adv Vult

Chao Hick Tin JC: By this action, the plaintiffs sued the defendant as guarantor under a guarantee executed by the defendant and three others (ie Goh Poh Seng, Margaret Goh and Lim Sun Chuang). The guarantee was given in consideration of the plaintiffs granting banking facilities to Hujong Enterprises Pte Ltd (hereinafter called 'Hujong'). The defendant was at the material time a shareholder and director of Hujong.

Background

The defendant is a Swiss national. He first came to Singapore in March 1982 and began work as the execu-

tive assistant manager of Orchard Hotel in charge of food and beverages. Sometime later, he met Goh Poh Seng (hereinafter called 'Goh') and they became friends. Goh approached him to inquire whether he would be interested in joining Goh in opening a new restaurant. The defendant agreed. In or about February 1983, the defendant left the employment of Orchard Hotel and joined Hujong which was incorporated on 31 March 1983 by Goh and his wife, Margaret Goh. The defendant was appointed a director on 7 April 1983 and was subsequently issued with 38,000 shares of $1 each. The other 90% of the shares in Hujong were held by Goh and Margaret Goh, each having 45%.

At the request of Hujong, the plaintiffs agreed to grant to it the following short term commercial banking facilities:

(a) overdraft	$720,000
(b) banker's guarantee	$ 60,000
	$780,000

This offer, dated 13 July 1983, was made subject to a number of conditions, among which were: (i) there should be a first legal mortgage of the property known as 98, Emerald Hill Road, Singapore 0923 ('the property'); (ii) there should be a joint and several personal guarantee of Goh Poh Seng, Margaret Goh, Peter Heiner Franz Bader (the defendant) and Lim Sun Chuang, all directors of Hujong; and (iii) a pledge of a fixed deposit of $40,000.

The board of directors of Hujong at a meeting on 13 July 1983 accepted the offer on the terms enumerated in the letter. The minutes of that meeting were confirmed and signed by all the four directors.

At the time of the offer, the property, which belonged to Goh Poh Seng and Margaret Goh, was already mortgaged to the Industrial & Commercial Finance Ltd ('ICF Ltd') and a sum of about $450,000 was then outstanding. On the instructions of Hujong, the plaintiffs paid off ICF Ltd and redeemed the property in order to secure for themselves a first legal mortgage of the property as required in their letter of offer. Prior to making the offer, the plaintiffs caused a valuation to be carried out to determine the worth of the property. Their valuer estimated that the property would fetch $510,000 at a forced sale and that $600,000 would be its market value. The valuation was done on 10 June 1983.

As required by the plaintiffs, the defendant and the other three co-directors executed the guarantee on 13 July 1983 in the presence of one Albert Yeo Toong Mok, an advocate and solicitor, who also executed an attestation to that effect.

Sometime on or about 16 August 1984, the defendant left the employment of Hujong and also ceased to be a director and shareholder of the company. On 16 February 1985, the defendant wrote to the plaintiffs informing them that he was no longer with the company and asked the plaintiffs to cancel the guarantee. Under cl 16 of the guarantee, it was provided that the guarantee would be 'binding on the guarantor ... until six months from the date when written notice shall have been received by the bank from the guarantor ... to discontinue this guarantee ... but so that the liability of the guarantor shall continue to exist to the extent of all sums of money and liabilities outstanding at the close of the day fixed for discontinuance ... until payment in full is received by the bank'.

The account of Hujong with the plaintiffs remained dormant after March 1985. On 7 January 1986, the plaintiffs served notice of demand on Hujong. On 13 February 1986, a notice of demand was served on all four guarantors, including the defendant. On 7 April 1986, the plaintiffs instituted Suit No 2662/86 against Hujong and the other three guarantors and obtained summary judgment against them on 10 October 1986. On 15 September 1986, Goh signed an agreement to sell the property at $510,000 and the transaction was completed on or about 10 December 1986. The proceeds of sale went to reduce the outstanding balance of Hujong with the plaintiffs. On 29 January 1987 the present action was instituted by the plaintiffs against the defendant.

On the application of the plaintiffs for summary judgment on the amount outstanding from Hujong, the assistant registrar granted conditional leave to defend, that is, the defendant should pay into court the sum claimed, $367,803.48, within a period of 28 days and in default there would be judgment for the plaintiffs. The defendant appealed against the order granting conditional leave to defend. I affirmed the decision to grant conditional leave but varied the condition imposed.

Issues raised

Various points were raised by the defendant in several long affidavits filed by him. However, as presented before me and as set out in counsel's written submission, the main issues raised for the defendant fell under the following heads:

(i) non est factum;
(ii) the sum claimed ($367,803.40) was excessive;
(iii) the plaintiffs were in breach of the agreement/guarantee;
(iv) the plaintiffs had given time to Hujong to pay;
(v) the plaintiffs had granted the company overdraft facilities exceeding $720,000;
(vi) negligence of the plaintiffs; and
(vii) conspiracy and fraud.

I should add that the points raised on these issues overlapped to some extent.

Before I deal with each of these specific issues I think it would be useful for me to set out the following pertinent provisions of the guarantee:

1 In consideration of the International Bank of Singapore Ltd ... granting ... at the request of the undersigned, banking facilities ... to ... Hujong Enterprises Pte Ltd ... *we* the undersigned ... *hereby unconditionally guarantee to the bank the due payment of and undertake on the bank's first demand in writing to pay to the bank all and every sum or sums of money which are* now or shall from time to time and at any time hereafter be due or *owing* or payable to the bank *by the borrower ... Provided always that the total amount recoverable from the guarantor hereunder shall not exceed the sum of Singapore dollars seven hundred and eighty thousand only* ($780,000) *together with a further sum comprising the accrued interest on that amount* or on such lesser sum as may be due or owing ...

3 The bank *shall be at liberty* without any obligation whatsoever to advise the guarantor and *without thereby discharging* or in any way impairing *its rights against the guarantor* hereunder at any time *to* determine *enlarge or vary* any credit advances or accommodation as aforesaid to the borrower or to vary exchange abstain from perfecting or release any other securities held or to be held by the bank for or on account of the obligations of the borrower or any part thereof to renew bills notes and other negotiable securities in any manner and *to compound with give or agree to give time for payment to accept compositions from grant any indulgence to and make any other arrangements as it may think fit with the borrower* or any obligant on bills notes or other securities held or to be held by the bank for and on behalf of the borrower.

4(a) This guarantee shall be in addition to and shall not be in substitution for or be in any way prejudiced or affected by any other collateral or security now or hereafter held by the bank for all or any part of the obligations of the borrower, nor shall any such other collateral or security or any lien to which the bank may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of such obligations be in any way prejudiced or affected by this present guarantee. The bank shall have full power at its discretion to give or agree to give time for payment to or make any other arrangement with any such other person or persons without prejudice to this present guarantee or any liability of the guarantor hereunder. And all money received by the bank from the guarantor the borrower or any person or persons liable to pay the same may be applied by the bank to any account or item of account or to any transaction to which the same may be applicable.

14 It shall not be necessary for the bank to advise the guarantor of any details relating to the administration of the borrower's account or accounts as aforesaid or of any default thereunder of which the bank may have knowledge and *a certificate signed on behalf of the bank by any officer of the bank shall be conclusive and binding on the guarantor as to any amount due to the bank by the borrower as aforesaid.*

(Emphases in the above clauses are added)

First issue: non est factum

The argument here of the defendant was that he did not know what he was signing when he signed the document. He said that he did not understand what the document meant. He also said that his command of the English language was limited. But Goh did tell him unless he signed the document Hujong could not carry on business.

However, in so far as the plaintiffs were concerned, they did not know and could not have known that the defendant did not understand what he signed. But the word 'guarantee' appeared in bold letters on the top of the first page of the document. Surely the defendant would have seen that and understood what that word meant. There was nothing to indicate to the plaintiffs that the defendant was misled into signing the document. The defendant was a member of the board of directors of Hujong. The board of directors had approved and accepted the offer and all the directors including the defendant signed the minutes of that meeting. No doubt the defendant was at that point in time only in Singapore for one year and four months but I did not think he was such an ignoramus as he sought to make himself out to be. If he really did not understand the document he was about to sign and was concerned about it, he should have reserved his position and sought independent advice. This he did not do. In his own affidavit, the defendant admitted that Goh persuaded him not to obtain independent advice. I would also mention in passing that the defendant's letter of 16 February 1985 to the plaintiffs showed that his command of the English language was good. He chose to be in business with Goh and trusted him. Even if Goh should mislead him he had only himself to blame. He could have a cause of action against Goh. But that was not to say that he was entitled to renege on his commitment with the bankers who had, based on his guarantee, given credit to his company, Hujong. In my view, on the facts of this case the plea of non est factum was clearly not available to him: see *Saunders* v *Anglia Building Society*.[1]

An incidental matter raised by the defendant was this. He said that as the letter of offer of 13 July 1983 was only received on 14 July 1983, the guarantee could not have been executed on 13 July 1983. It was not denied that the defendant executed the guarantee and also signed the minutes of meeting of 13 July 1983 of the board of directors of Hujong. If there was an error in the dating of the guarantee, I did not think that was of any consequence. Indeed, I would venture to think that when Goh signed on a copy of the letter these words 'We acknowledge receipt of the above' and dated '14 July 1983' that did not necessarily mean that the letter was received on 14 July 1983. It could very well be that the

letter was received on 13 July 1983 but the acknowledgement was only given on 14 July 1983.

Second issue: sum claimed excessive

On this issue, the defendant queried three sums. First was a sum of $21,400 from the proceeds of sale of the property. Secondly, he said that interest due on any amount in excess of the sum $720,000 should not be included in the plaintiffs' claim against him under the guarantee and this interest amounted in the aggregate to $25,000. Thirdly, the defendant contended that the plaintiffs should have liquidated the fixed deposit held by them as soon as he informed the plaintiffs of the cancellation of the guarantee. This was not done until a year later. He felt that a sum of $5,000 as interest was thereby unnecessarily incurred and charged to him.

The simple answer to these points was in cl 14 which provided that '... certificate signed on behalf of the bank by an officer of the bank shall be conclusive and binding on the guarantor as to any amount due to the bank by the borrower as aforesaid'. In any event, the plaintiffs had explained that the alleged unaccounted sum of $21,400 was taken out to pay for outstanding property tax, legal fees, and agency commission of 2% on the sale of the property. As regards the $25,000 interest charge, cl 3 of the guarantee expressly allowed the plaintiffs at any time to enlarge or vary the credit given to Hujong. Finally, as regards the third sum of $5,000, the plaintiffs were again, under cl 3 given the liberty to 'vary, exchange, abstain from perfecting or release any other securities' held by the plaintiffs and 'grant any indulgence to and make any other arrangements as it may think fit with the borrower'. I saw no merits on these points.

Third issue: breach of agreement/guarantee

The first complaint here was that as the letter of offer of 13 July 1983 only referred to an overdraft of $720,000, the plaintiffs were in breach when they allowed Hujong to draw in excess of that limit. There was clearly no merit in this argument. It has been dealt with above. Clause 3 of the guarantee expressly allowed the plaintiffs to 'enlarge or vary' the credit facilities granted to Hujong.

Another point under this head was that the plaintiffs allowed the company to draw on the facilities before the mortgage was registered. It had not been shown that the late registration had in any way prejudiced the defendant. Indeed under cl 3, the plaintiffs had the discretion to 'release any other securities held or to be held by the bank for or on account of the obligations of the borrower'.

Thirdly, the defendant complained that the payment by the plaintiffs of $450,154.52 to ICF Ltd to redeem the mortgage of the property and the honouring by the plaintiffs of two cheques (for $250,000 and $196,443.50) issued by the company were improper. As stated above, at the time when the plaintiffs made the offer on 13 July 1983, the property which was owned by Goh and his wife was already mortgaged to ICF Ltd. Under the terms of the offer the plaintiffs asked for a first legal mortgage of the property. To obtain that, the mortgage to ICF Ltd had to be redeemed. The plaintiffs did not know and could not have known that the defendant was unaware that the property was already mortgaged. It was reasonable for the plaintiffs to have assumed that the defendant knew of the position of the property at that point in time. It was part of the understanding between the plaintiffs and Hujong, in which the defendant was a director, that part of the overdraft facilities that would be given to the company would be utilized to redeem the property in order to enable the plaintiffs to secure a first legal mortgage over it. There was certainly no breach of any agreement as set out in the letter of offer dated 13 July 1983 or the terms of the guarantee when the payment was made to redeem the property on the instructions of Hujong, the borrower.

As regards the other two payments the cheques were regularly issued by Hujong with the necessary authorized signatories. There was nothing to indicate to the plaintiffs that the payments were not proper. Immediately prior to the payment on the cheque for $250,000, there was a payment into the account of Hujong of a sum of $350,073. It was entirely reasonable for the plaintiffs to assume that the defendant, as a director, was fully appraised of the financial position of Hujong. Whether a payment was a payment for the business of Hujong was for that company to decide. Hujong had not complained of any cheque being honoured by the plaintiffs. The guarantee the defendant gave was an unconditional one.

Accordingly, I was of the view that the points raised under this head were also without merits.

Fourth issue: time given to borrower to pay

Under this head the complaints were that (i) the plaintiffs had given Hujong time even though its account was not satisfactorily maintained; (ii) Hujong increased its paid-up capital by $620,000 in December 1984 and yet when the plaintiffs were informed of this in March 1985 they did not take steps to recover that sum and (iii) the plaintiffs failed to enforce the charge registered against Hujong.

The short answer to these points could be found in cl 3 where the plaintiffs were given liberty to 'give or agree to give time for payment, to accept compositions (to) grant any indulgence to and make any other arrangements as it may think fit with the borrower' and in cl 4

which provided that 'this guarantee shall be in addition to and shall not ... be in any way prejudiced or affected by any other collateral or security now or hereafter held by the (plaintiffs) for all or any part of the obligations of (Hujong)'.

Fifth issue: overdraft granted exceeded $720,000

The argument here was that as the overdraft limit to the company was only $720,000 and as the defendant's consent was not obtained to exceed that limit, all drawings after that limit had been reached should be disallowed applying the rule in *Clayton's* case.[2] This was very much the same point as was raised under the second issue. This argument ignored the fact that the guarantee which the defendant gave was an unconditional one and under cl 3 the plaintiffs were given the liberty to 'enlarge or vary' the credit.

Sixth issue: negligence

The defendant alleged negligence under this head and some of the particulars to show such negligence were a repeat of the above. I would accordingly not re-state them. The defendant further alleged that it was wrong for the plaintiffs to allow Goh to sell the property by private treaty. He said it should have been by public auction. The defendant also contended that the plaintiffs should have sold the property earlier in order to reduce the amount outstanding. However, the plaintiffs had explained that at the relevant time the property market was down and there were difficulties in disposing of the property. Further, the argument that an auction sale would fetch a better price was completely fallacious; indeed the opposite was true. The valuation carried out by the plaintiffs prior to the granting of the facilities indicated that the market value of the property was $600,000; but it would only fetch $510,000 in a forced sale situation. The defendant had not tendered any credible evidence to show that the property could have been easily sold earlier or that an auction sale would fetch a better price. Other than a bald assertion he had not shown by concrete evidence that the sale of the property by Goh at $510,000 was an under-value. Again the defendant completely ignored the provisions of cl 3. The plaintiffs were not obliged to dispose of the property straight away irrespective of the market condition.

Seventh issue: conspiracy and fraud

Because of all the above, the defendant alleged that the plaintiffs were in conspiracy with Hujong and with Goh in order to do him harm. The defendant relied on the following: giving credit exceeding the $720,000 limit, honouring a cheque for $250,000 issued by the company to Goh Poh Seng, allowing the property to be sold by private treaty to a company in which two doctors were shareholders, giving time to the company to pay up and failing to take prompt action in enforcement. Except for the point about the two doctors, all the others have already been dealt with hereinbefore.

As regards the sale of the property to JC Investments Pte Ltd, the defendant contended that it was underpriced. He questioned the propriety of the transaction because the two shareholders of JC Investments Pte Ltd were doctors and Goh himself was also a doctor. However, other than saying 'I believe that these two doctors are known to Goh', no evidence was produced to show that the two doctors were personal friends of Goh or related to him or that the sale was below market value at that time. This court was entitled to ask for something more than just bare allegations.

On his own admission, the defendant did not pay regard to financial matters of Hujong at the time when he joined the company and when he signed the guarantee. Now that the joint venture with Goh had failed, desperate attempts were made to question the guarantee. Having perused the affidavits and heard counsel for the defendant, what emerged quite clearly was that the defendant was taking pot-shots at every conceivable point he could imagine irrespective of whether there was any basis for making that point. This approach pervaded through all the allegations of the defendant. As a further illustration: the defendant argued that once Hujong had defaulted on the demand notice issued by the plaintiffs, the plaintiffs should have taken over possession of the property and rented it out. But had the plaintiffs done that, it would have been a disaster. The property was rent-control premises. There would be difficulties in subsequently removing the tenant. Without vacant possession the property would have fetched a much lower price. Indeed the valuer of the plaintiffs on 10 June 1983 estimated it at only $50,000 without vacant possession.

The issues raised by the defendant, putting them at the highest, were shadowy and hardly of any substance. I did not think I ought to grant unconditional leave to defend just because the defendant was vociferous in raising issues. I agreed with the assistant registrar that conditional leave to defend was the right decision. However, having regard to the financial circumstances of the defendant which were placed before me and which were not before the assistant registrar, I thought it appropriate that the condition imposed be revised as follows:

(i) that the defendant to charge in favour of the plaintiffs the first lot of 120,000 shares, which he held in another company, Top Ten Entertainment Pte Ltd ('Top Ten') and to furnish a banker's guarantee for the sum of $100,000;

(ii) alternatively, if the defendant's father should withdraw his claim, now pending in court, to the second lot of 120,000 shares in Top Ten which was also held under the name of

the defendant or if the father should fail in his claim thereof, the charging of the second lot of 120,000 shares in Top Ten may be substituted in place of the $100,000 banker's guarantee under (i) above.

The condition should be complied with within 30 days.

Subsequently, pursuant to a request of the defendant, a third option was granted to the defendant in case he would want to dispose of his shares in Top Ten. The condition was: the defendant to furnish a banker's guarantee for the sum of $300,000, in terms satisfactory to the registrar.

Order accordingly.

Solicitors: *Allen & Gledhill*; *B Mohan Singh & Co.*

Reported by *Ng Sheau Jiuan*

Thomas M Heysek & Anor v Boyden World Corporation

HIGH COURT (SINGAPORE) – MOTION IN SUIT NO 1094 OF 1988
CHAN SEK KEONG J
12 OCTOBER 1988

Civil Procedure – Interlocutory mandatory injunction sought – Substantially the entire relief claimed – Principles upon which injunction to be granted

The defendants had by a licence agreement (which replaced an earlier licence agreement) granted to the second plaintiff an exclusive licence to operate an executive recruiting business in Singapore, Indonesia and Brunei and in connection therewith to use the name 'Boyden', to employ the defendants' symbols, methods and systems of operation and to establish offices in those territories. By a stock purchase agreement the first plaintiff, having acquired all the shares in the second plaintiff (which shares were originally owned by the defendants), agreed to pay to the defendants the balance of the purchase price then outstanding. Some time later, the defendants served a notice of termination on the second plaintiff under the licence agreement on the ground that the second defendant had defaulted in the payment of fees under the licence agreement and that the first plaintiff had defaulted in the payment of instalments of the purchase price under the stock purchase agreement.

The plaintiffs commenced proceedings in which they sought, inter alia, a declaration that the licence agreement was wrongfully terminated and, in the alternative, damages for wrongful termination.

The defendants, having filed their defence and counterclaim for damages and a prohibitory injunction, filed a motion for an interlocutory mandatory injunction (a) to restrain the first plaintiff and the second plaintiff from (i) using or carrying on any business in Singapore using the name 'Boyden' or any other name resembling 'Boyden'; (ii) using or continuing to use the word and character 'Boyden' as part of their name and character or logo and to cause the second plaintiff's corporate name to be changed to another name that does not resemble 'Boyden' and (b) to deliver up to the defendants' solicitors all their files and records kept in connection with the licence agreement and their recruitment business.

Held, granting the application:

(1) Although the relief that was sought by the defendants was interim in form, it was, in the circumstances of the case, mandatory in effect. If granted, it prohibited the second plaintiff from carrying on business as the exclusive licensees of the defendants. It would have the effect of altering the status quo rather than preserving it. Accordingly, a court should be slow in granting it.

(2) In the present case, the defendants' application, if granted, would amount to substantially the entire relief claimed in the action. On the basis of the English Court of Appeal decision in *Locabail International Finance Ltd* v *Agroexport*,[2] the defendants were therefore required to show a clear case for relief or a high degree of assurance that the injunction, if granted, would rightly be granted.

(3) However, the high degree of assurance required may be mitigated by the justice of the case, which principle was stated in the decision in *Films Rover Ltd* v *Cannon Film Sales Ltd*.[3] On the basis of that decision, a less rigorous test was required where the withholding of a mandatory injunction may carry a greater risk of injustice than in granting it.

(4) On the documentary evidence in the instant case, the court was satisfied that there was a high assurance of the defendants succeeding in their counterclaim if the dispute should go to trial. However, if that finding was a wrong finding, the court was also of the view that there was a greater risk of injustice in withholding the injunction than in granting it. The plaintiffs had realized that whatever the result of the action might be, the business relationship between them and the defendants was dead and the first plaintiff had in fact admitted in his own words that the plaintiffs had stopped operating business under the name 'Boyden' as the defendants had refused to cooperate with the plaintiffs. The plaintiffs had offered an undertaking that they would not continue to operate any business and trade under the 'Boyden' name. However, they continued to refuse to change their corporate name by deleting 'Boyden' from it and thereby prevented the defendants from registering their own company with the name 'Boyden' and commencing their own business in Singapore. Furthermore, by virtue of cl 12 of the licence agreement, the defendants could still, in any event cause the automatic termination of the licence agreement by giving the required notice.

(5) If the termination was wrongful, the second plaintiff was entitled to damages and it was clear that in the circumstances of the case damages would be an adequate remedy.

Cases referred to

1 *Shepherd Homes Ltd* v *Sandham* [1971] Ch 340 (folld)
2 *Locabail International Finance Ltd* v *Agroexport* [1986] 1 WLR 657 (folld)
3 *Films Rover International* v *Cannon Film Sales Ltd* [1987] 1 WLR 670 (folld)

Koh Kok Wah for the defendants/applicants.
Tan Aye See (Ms) for the plaintiff/respondent.

Cur Adv Vult

Chan Sek Keong J: This is a motion for an interlocutory mandatory injunction (1) to restrain the first plaintiff and